

No. 12,415

IN THE

United States Court of Appeals
For the Ninth Circuit

CHIN CHIU FONG and CHIN CHIU
CHUNG,
vs.

Appellants,

ARTHUR J. PHELAN, Acting District
Director of the Immigration and
Naturalization Service, San Fran-
cisco District,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

FOREWORD.

The appellants arrived at the Port of San Francisco from China on December 15, 1948 applying for admission to the United States as United States citizens (Tr. p. 9), claiming to be the sons of Chin Yow Kin, a person whose United States citizenship had been conceded by the Immigration and Naturalization Service. (Tr. p. 10.) A Board of Special Inquiry hearing covering the two appellants was held on December 28, 1948, and subsequently. (Ex. A., pp. 88-47.) Al-

though the appellants had already been detained by the Immigration and Naturalization Service at 630 Sansome Street, San Francisco, for a period of thirteen days prior thereto, they then requested that the case be delayed until the father could be contacted. (Ex. A., p. 87.) The hearing was accordingly deferred and the Board of Special Inquiry was reconvened on January 7, 1949. (Ex. A., p. 85.) At this hearing the appellants had still received no word from their father. (Ex. A., p. 84.) However, during the recess of the case an appearance was noted by Edward Hong, an attorney at law in New York, N. Y., who stated that the parents would testify in New York, N. Y. He did not indicate a desire to be present at the Board of Special Inquiry here at San Francisco. (Ex. A., p. 84.)

Appellants do not urge in their appeal that they are in fact the sons of Chin Yow Kin. Neither do they urge that the conclusion of the Board of Special Inquiry was wrong in finding the appellants to be aliens and not the sons of the said Chin Yow Kin. Appellants base their appeal upon the sole ground that the Board of Special Inquiry failed to comply with provisions of law and regulations providing that immigrants may have a friend or relative present during a hearing before a Board of Special Inquiry. (Br. App., p. 4.)

In order to determine whether the appellants were granted a fair hearing in this respect, it is necessary to quote the entire preliminary portions of the hear-

ings. The introductory part of the hearings are as follows:

Hearing on December 28, 1948:

"TO APPLICANTS

Q. If at any time you should fail to understand the interpreter or to understand the meaning of any statement or question in the course of these proceedings you should so state at once. Do you understand?

A. By 1-4: Yes.¹

By 1-5: Yes.²

Q. What are all the names you have ever used or have ever been known by?

A. By 1-4: CHIN CHIU CHUNG, no others.
By 1-5: CHIN CHIU FONG, no others.

Q. State your native dialect. If you will testify in some other dialect explain why you will do so.

A. By 1-4: CANTON CITY dialect.
By 1-5: CANTON CITY dialect.

Q. Your right to enter the United States will be considered by this Board and all evidence in your behalf must be submitted at this hearing. You have the right to be represented in this proceeding by an attorney or by any other person admitted to practice before this Service or the Board of Immigration Appeals. Do you wish to be so represented?

A. By 1-4 and By 1-5: I desire to delay this case until I can write a letter to my father and see what he wants us to do.

¹"1-4" is shown in the heading of the hearing to refer to Chin Chiu Chung, the younger appellant. (Ex. A, p. 88.)

²"1-5" is shown in the heading of the hearing to refer to Chin Chiu Fong, the elder appellant. (Ex. A, p. 88.)

(If not) Q. Do you waive your right to representation by counsel in this proceeding?

A.

Q. You are informed that you or your qualified representative have the right in this proceeding to examine any witnesses offered in your behalf, to cross examine any witnesses called by the Government, to offer evidence material and relevant to any matter in issue, and to make objections which shall be entered on the record. Do you understand?

A. By 1-4: I understand.

By 1-5: I understand.

Q. You also have the right at this hearing to have a friend or relative present, who, if a witness, must have finished testifying. Do you wish to use this right?

A. By 1-5: I have a friend, CHEUNG YIN KUEY, who I would like to have present.

Q. Do you solemnly swear that the testimony you are about to give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

A. Yes (BY EACH APPLICANT).

Q. Have you any letters, documents or photographs which you wish to offer in support of your application for admission to the United States?

A. BY EACH APPLICANT: I have nothing but my testimony.

Q. You are informed that if you wilfully and knowingly give false testimony in the course of these proceedings, you may be prosecuted for perjury, the penalty for which is a fine of not more than \$2000 and imprisonment of not more than five years. Do you understand?

A. BY EACH APPLICANT: Yes.

Q. How long do you intend to remain in the UNITED STATES?

A. BY EACH APPLICANT: Permanently.

Q. Have either of you a passport of any nature?

A. BY EACH APPLICANT: No.

Q. Have either of you ever obtained an immigration visa from an American Consular officer?

A. Whatever I have, I have already presented to you.

Q. There are no immigration visas among any of the papers you have presented to this Service. Have you ever applied for a immigration visa from an American Consular officer?

A. BY EACH APPLICANT: No.

CHAIRMAN TO CHIN CHIU FONG:

Q. You have stated that you desire to have CHEUNG YIN KUEY present at the time you testify. What is his address?

A. I don't know his address. Probably my father knows his address.

Q. Would CHEUNG YIN KUEY be qualified to testify in your behalf as a witness?

A. I believe he is.

Q. To just what would he be able to testify?

A. *He knows me and my brother.* (Italics supplied)

Q. When did he come to the UNITED STATES?

A. I don't know when he came to the UNITED STATES, but I know he went back to CHINA in June of last year.

Q. When and where did you last see CHEUNG YIN KUEY?

A. I last saw him in my house in HONG KONG October of last year.

Q. How old a man is he?

A. I think he is a little over thirty.

Q. Are there any other persons in the UNITED STATES who would be willing to testify in your behalf as witness?

A. No others.

Q. Is there any person now living in the UNITED STATES with whom you were acquainted in CHINA?

A. BY EACH APPLICANT: Just my father and mother.

Q. Where is your mother living at this time?

A. BY EACH APPLICANT: She is now living in NEW YORK with my father.

Q. You have been here, at these quarters, for about two weeks. Have you made any attempt in that time to contact your father or mother?

A. BY 1-5: I have written once to my father, but I have not heard from him yet.

Q. Just how long do you desire to delay this hearing before you will be able to advise us whether or not you desire to be represented by an attorney or by any other person?

A. I shall notify you immediately after I receive word from my father.

Q. You are advised that it is the desire of this Service to complete these hearings as expeditiously as possible. For that reason you should attempt to contact your father either by airmail or telegram. Do you understand?

A. BY EACH APPLICANT: I understand.

Q. When this hearing is again resumed you should be in a position to advise this Board as to

whether your father and mother and CHEUNG YIN KUEY will appear here as witnesses in your behalf. Do you understand?

A. BY EACH APPLICANT: I understand.

Q. You are advised that this Board of Special Inquiry will be recessed in order to give you an opportunity to obtain advice from your father concerning the retention of Counsel. You should immediately let us know when you are ready to proceed with this hearing. Do you understand?

A. I understand. BY EACH APPLICANT.

Q. Have you understood the interpreter and all the questions asked you?

A. BY EACH APPLICANT: Yes.

Q. Have you any further statement to make at this time?

A. BY EACH APPLICANT: No.

BY CHAIRMAN:

This hearing is deferred.

January 7, 1949

H. H. CARSON REPLACES G. T. PATTERSON AS SECOND MEMBER.

BY MEMBER CARSON:

I have familiarized myself with all the testimony and evidence adduced thus far in these cases.

Interpreter, Stephen Louie

APPLICANTS CHIN CHIU CHUNG AND CHIN CHIU FONG RECALLED TO BOARD ROOM AND ADMONISHED THAT THEY ARE STILL UNDER OATH TO TELL THE TRUTH AND SUBJECT TO THE PENALTIES OF PERJURY.

CHAIRMAN TO APPLICANTS:

Q. Are you the same CHIN CHIU CHUNG and CHIN CHIU FONG who last appeared before this Board on December 28, 1948?

A. Yes.

Q. At that time, this Board was recessed in order to give you an opportunity to correspond with your father to find out what he wanted you to do in regard to retaining an attorney. Have you received any word from your father?

A. No.

BY CHIN CHIU FONG: I wrote a letter to my father on December 28, 1948. The last letter was returned to me yesterday for additional postage. I wrote to my father again yesterday.

Q. You are advised that this Service has received a letter from EDWARD HONG, Attorney at Law in NEW YORK CITY, entering his appearance as attorney in these cases and has stated that your parents will testify in NEW YORK CITY. The interpreter will now read you these letters, and each of you are requested to state if you are ready to proceed with your hearing at this time.

A. BY CHIN CHIU FONG: Yes.

BY CHIN CHIU CHUNG: Yes.

Q. Inasmuch as Attorney Edward Hong is in New York City, it is evident that he will waive his personal appearance at this hearing. Do you understand?

A. Yes. (BY BOTH APPLICANTS)."
(Ex. A, pp. 87-84.)

It will be noted that appellant "1-5", Chin Chiu Fong, is one year and one month older than appellee

lant "1-4", Chin Chiu Chung. (Ex. A, p. 88.) It was natural that he should state for both brothers who the witnesses were to be and who they desired to be present as a friend or relative. It will be noted that Chin Chiu Fong stated that Cheung Yin Kuey (the friend whom he desired to have present) would be able to testify as to both himself and his brother. (Ex. A, p. 86.) It is also worthy to note that Chin Chiu Fong, as the elder brother, was the one who was conducting the correspondence with the father. (Ex. A, p. 86.)

ARGUMENT.

Appellee concedes that regulations have the force and effect of law and for the purposes of this brief concedes that regulations must be given effect according to their plain and obvious meaning. However, the primary hypothesis as set forth on page 13 of appellant's brief that "failure of the Board of Special Inquiry to advise the appellant, Chin Chiu Chung, in accordance with mandatory regulations of the Department is a denial of due process of law" is not borne out by the record in this case. As a matter of fact, exactly the contrary appears. It is clearly shown that both appellants were present at the hearing on December 28, 1948, and that both were advised of the right referred to in the following language: "You also have the right in this hearing to have a friend or relative present who, if a witness, must have finished testifying. Do you wish to use this right?" (Ex. A, p.

87.) It is only reasonable and proper to conclude that the answer given by the elder appellant, Chin Chiu Fong, was on behalf of both appellants. This assumption is further borne out by the statement made by Chin Chiu Fong when questioned concerning Cheung Yin Kuey to the effect that the aforementioned witness "knows me and my brother". (Ex. A, p. 86.) The record further affirmatively shows that the appellants were given a reasonable fixed period of time within which to arrange for the presence of Cheung Yin Kuey. (Ex. A, p. 85.) This "friend" later appeared as a witness in the appellants' behalf. His testimony shows that he lives in Philadelphia, Pennsylvania. (Ex. C, Ex. 7, p. 1.)

While the rule concerning the presence of a friend or relative has been changed since 1929 it is of interest to note the opinion of the Circuit Court of Appeals for the First Circuit in the case of *Stone Ex Rel. Colonna v. Tellinghast*, 32 F. (2d) 442, in which the Court stated at page 449:

"The provisions contained in Rule 11, Subdivision B, Paragraph 1 that 'the alien may have a friend or relative present at the hearing before the Board of Special Inquiry is not mandatory and does not require the Board to so inform the alien'."

citing *United States v. Dunton* (C.C.A. 297 Fed. 447).

The sole purpose of a petition for a writ of habeas corpus is to inquire into the legality of the custody. (28 U.S.C. Ch. 153.) The scope of judicial review on

habeas corpus is extremely narrow. The administrative findings of fact are conclusive if supported by some evidence of probative value and are not open to attack merely by showing they are wrong.

Vajtauer v. Commissioner, 273 U.S. 103 (1927);
Tisi v. Todd, 264 U.S. 109, 133 (1924).

The courts on habeas corpus will determine a petitioner's charge that the administrative hearing was unfair.

Todd v. Waldman, 266 U.S. 113 (1924).

The Immigration statutes contemplate that administrative decisions, when made within the scope of statutory authority, shall be final. The only question to be determined by this Court is whether the applicants herein were granted a "fair hearing" as required by the due process clause of the Constitution of the United States. (Constitution, Fifth Amendment.)

Vajtauer v. Commissioner, *supra*.

Respondent submits, that unless it affirmatively appears that the appropriate immigration officer has acted in some improper or unlawful way, and has abused his discretion, his decision as to citizenship and admissibility must be deemed conclusive and is not subject to review by the Court.

Tang Tun v. Edsell, 223 U.S. 673, at p. 675.

CONCLUSION.

Appellee submits that appellants were granted a fair and impartial hearing and that no substantive rights guaranteed and protected by the Constitution were violated. It is respectfully urged that the decision of the Court below should be affirmed.

Dated, San Francisco, California,
February 24, 1950.

Respectfully submitted,

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